

**REMARKS**

This invention relates to *inter alia* pre-emergence herbicidal compositions, which comprise at least one post-emergence herbicide and carrier selected from the group consisting of fuller's earth, aerogels, high molecular weight polyglycols and polymers based upon acrylic acids and methacrylic acid and copolymers thereof, as well as to a method of using a post-emergence herbicide in a pre-emergence manner. Applicants discovered that if a post-emergence herbicide were formulated with specific types of carriers, one could use the post-emergence herbicide pre-emergently.

Entry of this Amendment is requested as it is directly responsive to the outstanding Advisory Action and does not add new matter that requires further consideration and/or search, and either places the application in condition for allowance or in better form for appeal.

This Amendment is being filed after the undersigned made numerous telephone calls to Examiner Pryor, during which a final resolution with respect to the questions being asked by the undersigned was not provided. Applicants are extremely dissatisfied that no definitive answers with respect to the questions concerning the status of claims 14 to 16 and possible amendments to claims 1 to 7 were provided by the Office despite numerous attempts since August 4, 2003. The Examiner's inability to meaningfully contact the undersigned has caused injustices to both the Applicants and the undersigned in seeking timewise extensions, thereby shortening patent term.

Pursuant to 37 C.F.R. 1.136(a), Applicants petition the Assistant Commissioner to extend the time period to file a response by one (1) month, i.e., up to and including November 3, 2003. A check for \$110 is enclosed to cover the cost of the petition. It is believed that no further fee is

required. If, however, an additional fee is due, the Assistant Commissioner is authorized to charge such fee, or credit any overpayment, to Deposit Account 50-0320.

Applicants further amend claim 1 by clarifying that the only herbicides present in the composition are pre-emergence herbicides. Applicants are making this amendment in order to advance prosecution and not for reasons related to patentability. Hence, this change is being made without prejudice, admission, surrender of subject matter, or intention of creating estoppel as to equivalents. Support for the amendment of claim 1 is found throughout the specification; e.g. particularly on page 1, lines 34 to 38 and in Tables 1-4 and 1a-3a. Thus, no new matter was added.

During a telephone call with Examiner Pryor on September 30, the Examiner indicated that it appears that the Advisory Action incorrectly identified claims 14 to 17 as being objected to for depending upon a rejected claim since these claims are independent from claim 1. Clarification of this issue is requested.

In box 2, the Advisory Action stated that dependent claim 7 adds further herbicides in addition to the active compounds recited in independent claim 1. This Amendment corrects this issue.

Applicants thank the Examiner for indicating that claim 17 was allowable and that claims 14-16 would be allowable if rewritten in independent form. Accordingly, this Amendment rewrites claim 14 in independent form and therefore does not affect the doctrine of equivalents. Claim 15 depends from claim 14, and claim 16 depends from claim 15. Therefore, Applicants respectfully urge reconsideration and withdrawal of the objection.

Claims 1-9 were rejected under 35 U.S.C. 103(a) for allegedly being unpatentable over Masayuki et al, EP 204146 ("Masayuki"), and Langley et al, JP 58113101 ("Langley"). In light

of the amendment of claim 1, Applicants urge that the rejection does not establish a *prima facie* case of obviousness. Applicants respectfully submit that one skilled in the art knows that post-emergent herbicides are not applied under pre-emergent conditions because the post-emergent herbicides are not known or expected to have the desired pre-emergent activities. Accordingly, withdrawal of the rejection is requested.

Contrary to the knowledge in the art, Applicants discovered that the inventive herbicidal compositions, which comprise post-emergent herbicides admixed with auxiliary carriers, are active under pre-emergent conditions. One skilled in the art would not be motivated by the teachings of Masayuki and Langley because they only teach that which is conventional in the art; i.e. herbicidal compositions which contain post-emergence or mixed action herbicides and are used post-emergently. These publications do not teach or disclose that combinations comprising post-emergent herbicides, and a carrier material selected from the group consisting of fuller's earth, aerogels, high-molecular-weight polyglycols and polymers based on acrylic acid, methacrylic acid and copolymers thereof may be used pre-emergently.

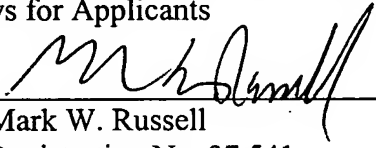
Neither Masayuki nor Langley suggests a composition that comprises only post-emergence herbicides and using this composition as a pre-emergence herbicidal composition. In fact, these prior publication teach using the compositions described therein as post-emergence herbicidal compositions. Hence, these publications actually teach away from the inventive pre-emergence composition. It should be noted that the herbicidal composition disclosed in Masayuki is further distinguished by the fact that it contains a mixed use herbicide, viz. 2(4-chloro-floro-5-propyloxophenyl-5,6,7,8-tetrahydro-1H-1,2,4-triazolo-(1,2-a)-pyridozine-1,2-2H-dione, a compound excluded by the present claim language in claim 1.

In view of the foregoing it is urged that the present claims are in condition for allowance.  
However, should the Examiner be of a different opinion, it is requested that he telephone the undersigned before issuing an Advisory Action in order to discuss any outstanding issues.

Respectfully submitted,

FROMMER LAWRENCE & HAUG LLP  
Attorneys for Applicants

By: \_\_\_\_\_

  
Mark W. Russell  
Registration No. 37,541  
745 Fifth Avenue  
New York, New York 10151  
(212) 588-0500